A

MODERN FREIGHT EXPRESS v. AFZARIZZAL ABDUL WAHAB & ORS

COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
ABDUL RAHMAN SEBLI JCA
B ZALEHA YUSOF JCA
[CIVIL APPEAL NO: B-01(A)-371-09-2016]
13 APRIL 2017

C ***CUSTOMS AND EXCISE:*** *Seizure – Seizure of goods – Written claims made to Customs Department not entertained – Customs Department did not refer matter to Magistrates' Court and did not proceed with prosecution – Whether claim made within one month calendar period from date of seizure – Whether claim must be made by owner and not representative – Whether claim made by solicitors valid – Whether there was further detention of consignment – Customs Act 1967, s. 128*

D The appellant ('the plaintiff') was appointed and instructed by six different consignors to take possession and to manage the consignments of goods ('the goods'). The goods, shipped by the consignors from Vietnam to Northport, Port Klang, were to be shipped in stages to the respective consignees in Singapore. Pursuant to the Free Zones Act 1990, Northport, Port Klang was E a free zone area and the goods were not subjected to payment of any customs duty or taxes when brought into the free zone area from outside Malaysia. The plaintiff made the necessary declaration of the goods which were duly approved by Lembaga Pelabuhan Klang but later learnt that the goods were seized by the Customs Department. The plaintiff made a written claim under F s. 128(1) of the Customs Act 1967 ('the Act') to the defendants, demanding for the release of the goods. The defendants did not release the goods nor refer the plaintiff's claim to the Magistrates' Court for a decision. Instead, the plaintiff received a notice of seizure issued by the senior customs officer, the first respondent ('the first defendant'), pursuant to s. 114 of the Act, G stating, *inter alia*, that any claim must be made in writing within one month from the receipt of the said notice. Again, the plaintiff claimed for the release of the goods but the defendants failed to release the same and failed to refer the matter to the Magistrate's Court. This prompted the plaintiff to commence an action at the High Court, seeking, *inter alia*, (i) a declaration that the forfeiture of the goods by the defendants was illegal; and (ii) damages. H The High Court held that: (i) s. 128 of the Act does not make a provision for a prosecution to be brought within one month; (ii) the issue of continuous seizure did not arise because the first defendant had yet to decide whether the goods were deemed to be forfeited; (iii) the Director General may only direct the first defendant to refer to court when the latter had made a decision I that the goods were deemed forfeited and he referred the matter to the

Director General for his directive; and (iv) the written claim for the goods made by the solicitor on behalf of the plaintiff was not a valid claim as it was not done personally by the plaintiff. Hence, the present appeal. The issue that arose for the court's adjudication was whether, upon receiving the plaintiff's written claim for the goods within the one calendar month period, the defendants, who had refused to release the goods, must refer the matter to the court to determine the ownership by way of proceedings under sub-s. 128(4) and (5) of the Act.

Held (allowing appeal with costs; remitting case to High Court for assessment of damages)

Per Tengku Maimun Tuan Mat JCA delivering the judgment of the court:

(1) The goods were seized on 9 November 2015. *Vide* a letter dated 19 November 2015, which was well within the one calendar month from the date of the seizure, the plaintiff made a claim to the goods. Even if one were to take the notice of seizure dated 27 November 2015, the plaintiff had again made its written claim *vide* a letter dated 30 November 2015, also within the prescribed time. The written claim made by the plaintiff's solicitor on behalf of the plaintiff was a valid claim as provided under sub-s. 128(2) of the Act, particularly when the defendants had not objected nor disputed the claim from the solicitors on behalf of the plaintiff at any point in time. (paras 35 & 36)

(2) Where a written claim was made by the plaintiff for the goods within one calendar month from the date of seizure and no prosecution was commenced in respect of the goods within the same period of time, then on the expiration of the one calendar month from the date of the claim, the defendants should release the goods or refer the claim to the Magistrates' Court. Since the defendants failed to do either, the defendants failed to observe the statutory requirements under s. 128 of the Act. (para 37)

(3) There need not be a decision by the first defendant that the goods were deemed forfeited as the forfeiture occurred by operation of law, namely when the three situations stated in sub-s. 128(1)(a) to (c) did not occur before the expiration of one month from the date the goods were seized. It is expressly provided under sub-s. 128(1) of the Act that the goods shall not be taken or deemed to be forfeited if there was a written claim made by any person asserting that he is the owner within one calendar month from the date of seizure. (para 39)

A ***Bahasa Malaysia*** *Headnotes*

Perayu ('plaintif') dilantik dan diarahkan oleh enam pemberi konsain untuk mengambil milikan dan menguruskan konsainan barang-barang ('barang-barang'). Barang-barang tersebut, yang diangkut oleh pemberi konsain dari Vietnam ke Pelabuhan Utara, Pelabuhan Klang, akan diangkut secara
B berperingkat ke penerima-penerima konsain di Singapura. Bawah Akta Zon Bebas 1990, Pelabuhan Utara, Pelabuhan Klang adalah kawasan zon bebas dan barang-barang tersebut tidak dikenakan bayaran duti kastam atau cukai apabila dibawa ke dalam kawasan zon bebas dari luar Malaysia. Plaintif membuat pengisytiharan barang-barang tersebut, seperti yang sepatutnya,
C dan ini disahkan oleh Lembaga Pelabuhan Klang namun kemudian dimaklumkan barang-barang tersebut dirampas oleh Jabatan Kastam. Plaintif membuat tuntutan bertulis bawah s. 128(1) Akta Kastam 1967 ('Akta') kepada defendan-defendan, menuntut pelepasan barang-barang tersebut. Defendan-defendan tidak melepaskan barang-barang tersebut mahupun
D merujuk tuntutan plaintif kepada Mahkamah Majistret bagi keputusan. Sebaliknya, plaintif menerima satu notis rampasan daripada pegawai kanan kastam iaitu responden pertama ('defendan pertama') bawah s. 114 Akta, menyatakan, antara lain, bahawa apa-apa tuntutan mesti dibuat secara bertulis dalam satu bulan dari tarikh penerimaan notis tersebut. Plaintif
E sekali lagi menuntut pelepasan barang-barang tersebut tetapi defendan gagal melepaskannya dan gagal merujuk hal perkara tersebut ke Mahkamah Majistret. Ini mendorong plaintif memulakan satu tindakan di Mahkamah Tinggi, memohon, antara lain; (i) pengisytiharan bahawa pelucuthakkan barang-barang tersebut oleh defendan menyalahi undang-undang; dan
F (ii) ganti rugi. Mahkamah Tinggi memutuskan: (i) s. 128 Akta tidak memperuntukkan agar pendakwaan dibuat dalam masa satu bulan; (ii) isu rampasan berterusan tidak timbul kerana defendan pertama belum memutuskan sama ada barang-barang tersebut dianggap terlucut hak; (iii) Ketua Pengarah hanya boleh mengarahkan defendan pertama merujuk kepada mahkamah apabila defendan pertama memutuskan bahawa barang-
G barang tersebut dianggap terlucut hak dan dia merujuk perkara tersebut kepada Ketua Pengarah bagi arahan; dan (iv) tuntutan bagi barang-barang tersebut yang dibuat secara bertulis oleh peguam cara plaintif bagi pihaknya tidak sah kerana tidak dibuat sendiri oleh plaintif. Maka timbul rayuan ini. Isu yang terbit bagi pertimbangan mahkamah adalah sama ada, sebaik sahaja
H menerima tuntutan bertulis bagi barang-barang tersebut dalam tempoh satu bulan kalendar, defendan-defendan yang enggan melepaskan barang-barang tersebut mesti merujuk kepada mahkamah untuk menentukan milikan melalui prosiding bawah sub-s. 128(4) dan (5) Akta.

I

Diputuskan (membenarkan rayuan dengan kos; mengembalikan kes kepada Mahkamah Tinggi bagi taksiran ganti rugi)
Oleh Tengku Maimun Tuan Mat HMR menyampaikan penghakiman mahkamah:

(1) Barang-barang tersebut dirampas pada 9 November 2015. Melalui surat bertarikh 19 November 2015, iaitu dalam tempoh satu bulan kalendar dari tarikh rampasan, plaintif membuat tuntutan bagi barang-barang tersebut. Jika pun notis rampasan bertarikh 17 November 2015 diambil kira, plaintif telah, sekali lagi, membuat tuntutan bertulis melalui surat bertarikh 30 November 2015, yang juga dalam tempoh masa yang ditetapkan. Tuntutan bertulis yang dibuat oleh peguam cara plaintif bagi pihaknya sah seperti yang diperuntukkan bawah sub-s. 128(2) Akta, khususnya kerana defendan-defendan tidak sekali pun membantah mahupun mempertikaikan tuntutan peguam cara plaintif bagi pihaknya.

(2) Jika tuntutan bertulis dibuat oleh plaintif bagi barang-barang dalam masa satu bulan kalendar dari tarikh rampasan dan pendakwaan tidak dimulakan bagi barang-barang tersebut dalam tempoh masa yang sama, defendan-defendan seharusnya melepaskan barang-barang tersebut atau merujuk tuntutan tersebut kepada Mahkamah Majistret apabila tamat tempoh satu bulan kalendar dari tarikh tuntutan. Memandangkan defendan-defendan gagal melaksanakan kedua-duanya, defendan gagal mematuhi peruntukan statutori bawah s. 128 Akta.

(3) Tidak perlu ada keputusan oleh defendan pertama bahawa barang-barang tersebut dianggap terlucut hak kerana pelucuthakkan terjadi dengan operasi undang-undang, khasnya apabila tiga situasi yang dinyatakan dalam sub-s. 128(1)(a) hingga (c) tidak berlaku sebelum tamat tempoh satu bulan dari tarikh barang-barang dirampas. Jelas diperuntukkan bawah sub-s. 128(1) Akta bahawa barang-barang tersebut tidak boleh diambil atau dianggap terlucut hak jika terdapat tuntutan bertulis oleh mana-mana orang yang menegaskan dirinya sebagai pemilik dalam tempoh satu bulan kalendar dari tarikh rampasan.

Case(s) referred to:
Assan Mohammad & Ors v. Hock Huat Chan Sdn Bhd [2013] 9 CLJ 545 CA ***(refd)***
Hock Huat Chan Sdn Bhd v. Assan Mohammad & Ors [2008] 4 CLJ 512 HC ***(refd)***
Mehdi Dadashi Havadaragh v. Ketua Pengarah Jabatan Kastam Diraja Malaysia & Ors [2015] 4 CLJ 607 CA ***(refd)***
Soong Chee Keong v. PP & Another Case [1950] 1 LNS 84 HC ***(refd)***
Sunthararaju Pachayappan v. Jabatan Kastam Diraja Malaysia [2010] 3 CLJ 865 HC ***(refd)***
The Director General Of Customs Malaysia And The Director Of Customs, Sarawak & Ors v. Chong Yin Kim Trading Sdn Bhd & Ors And Another Appeal [2016] 9 CLJ 130 HC ***(refd)***

A **Legislation referred to:**
Customs Act 1967, ss. 2, 114(1), 115, 128(1)(a), (b), (c), (2), (3), (4), (5), 132, 133(1)(e), 135(1)(e)

For the appellant - JR Ravendren & Janeni Devi Revendren; M/s JR Ravendren & Assocs
For the respondents - Norliza Zulkifli & Hani Aziza Ismail; SFCs

B *[Editor's note: For the High Court judgment, please see Modern Freight Express v. Afzarizzal Abdul Wahab & Ors [2017] 4 CLJ 503 (overruled).]*

Reported by Najib Tamby

C **JUDGMENT**

Tengku Maimun Tuan Mat JCA:

[1] This appeal concerns s. 128 of the Customs Act 1967 (the Act) which reads:

D **128. Goods seized in respect of which there is no prosecution, or the proceeds of sale thereof, are forfeited if not claimed within one month.**

(1) If there be no prosecution with regard to any goods seized under this Act, such goods or the proceeds of sale of such goods which are held pursuant to paragraph 115(1)(c) shall be
E taken and deemed to be forfeited at the expiration of one calendar month from the date of seizure of the goods unless, before such expiration –

(a) a claim to such goods or the proceeds of sale of such goods is made under subsection (2);

F (b) a written application is made for the return of such goods under paragraph 115(1)(a) or (b); or

(c) such goods are returned under the said paragraph (a) or (b).

G (2) Any person asserting that he is the owner of such goods or the proceeds of sale of such goods, as the case may be, and that they are not liable to forfeiture may give written notice to a senior officer of customs that he claims the same.

(3) On the expiration of the period mentioned in subsection (1), or, if a decision is made earlier that there be no prosecution with
H regard to the goods, on the making of the decision the senior officer of customs shall, if such goods or the proceeds of sale of such goods are not taken and deemed to be forfeited under that subsection, refer the claim to the Director General who may direct that such goods or the proceeds of sale of such
I goods or the security furnished under paragraph 115(1)(a) or (b), as the case may be, be released or may direct such senior officer of customs, by information in the prescribed form, to refer the matter to a Magistrate of the First Class for his decision.

(4) The Magistrate of the First Class shall issue a summons requiring the person asserting that he is the owner of the goods or the proceeds of sale of such goods, and the person from whom the goods were seized, to appear before him, and upon their appearance or default to appear, due service of such summons being proved, the Magistrate of the First Class shall proceed to the examination of the matter, and upon proof that an offence against that Act or any regulations made thereunder has been committed and that such goods were the subject matter, or were used in the commission, of such offence, shall order such goods or the proceeds of sale of such goods or the amount secured under paragraph 115(1)(a) or (b), as the case may be, to be forfeited, or in the absence of such proof, may order the release of such goods or the proceeds of sale of such goods or the security furnished under paragraph 115(1)(a) or (b), as the case may be.

(5) In any proceedings under subsection (4), section 119 shall apply to the person asserting that he is the owner of the goods and to the person from whom they were seized as if such owner or person had been the defendant in a prosecution under this Act.

The Background Facts

[2] The chronological events leading to the dispute in this appeal, as disclosed in the affidavits filed by the respective parties are as follows.

[3] On or about 16 September 2015 and 17 September 2015, the plaintiff was appointed and instructed by six different consignors to take possession and to manage the declaration, clearance and shipping of the consignments of 'Beer and Apple Cider' ("the said goods").

[4] The said goods, conveyed in 40 containers, were shipped by the consignors from Vietnam to the Northport, Port Klang to be shipped in stages to the respective consignees in Singapore.

[5] Pursuant to the Free Zones Act 1990, Northport, Port Klang is a free zone area where the said goods are not subjected to payment of any customs duty or taxes when the said goods were brought into the free zone area from outside Malaysia. The authority responsible for the administration, management and operation of all activities in the Northport Free Zone including permitting the movement of goods into and out of the free zone area is the Port Klang Authority or Lembaga Pelabuhan Klang (LPK).

[6] For purposes of removing the said goods in stages to Singapore based on the availability and confirmation of the vessels, the plaintiff had made the necessary declaration of the said goods in the prescribed forms which were duly approved by the LPK.

[7] On 13 November 2015, the plaintiff, upon making an enquiry with the customs officer at the Enforcement Division, was informed that the said goods in the 40 containers had been seized by the Enforcement Division of the Customs Department on 9 November 2015. At the material time, the first defendant was the senior officer of customs, holding the post of an Assistant Director in the Enforcement Division, Customs Department, Selangor.

[8] By a letter dated 19 November 2015, the plaintiff through its solicitors, made a claim to the State Director of Customs, Selangor (the second defendant) pursuant to s. 128(1) of the Act, demanding the release of the said goods. The defendants did not release the goods. Neither did the defendants refer the plaintiff's claim to the Magistrate's Court for decision after the expiration of one month from the date of the notice of claim.

[9] On 30 November 2015, the plaintiff however received a notice of seizure dated 27 November 2015 issued by the first defendant pursuant to s. 114 of the Act. The notice which was specifically addressed to the plaintiff, stated among others that "sebarang tuntutan hendaklah dikemukakan secara bertulis dalam tempoh satu bulan dari tarikh penerimaan notis ini".

[10] *Vide* a letter dated 30 November 2015, the plaintiff through its solicitors made a claim for the release of the said goods. The defendants failed to release the said goods and failed to refer the matter to the Magistrate's Court. There was no prosecution preferred against the plaintiff in respect of the said goods.

[11] The plaintiff contended that the continuous seizure of the said goods was made without any reasonable and probable cause and that the defendants have a statutory duty to refer the plaintiff's claim to the Magistrate's Court for decision on the expiry of one calendar month from the date of seizure of the said goods.

[12] On 14 January 2016, the plaintiff filed an originating summons against the defendants in the High Court at Shah Alam seeking the court's determination on the following questions:

> 1. Samada berdasarkan kepada satu pentafsiran yang benar dan tepat terhadap subseksyen 128(3) dan subseksyen 128(4) Akta Kastam 1967 (Akta 235) bahawasanya dalam keadaan dimana tiada pendakwaan dijalankan dan dimana tuntutan sewajarnya dibuat oleh plaintif terhadap "Beer" (selepas ini dirujuk sebagai "barang tersebut") didalam 40 buah kontena masing-masing seperti di Lampiran "A", yang disita oleh defendan-defendan pada 9.11.2015, defendan-defendan yang gagal dan/enggan melepaskan barang tersebut adalah tidak berkuasa disisi undang-undang untuk terus menyita barang tersebut selepas tamat tempoh satu bulan kalender dari tarikh penyitaan tanpa dirujuk kepada Mahkamah adalah menyalahi undang-undang; dan

2. Samada berdasarkan kepada satu pentafsiran yang benar dan tepat terhadap subseksyen 128(3) Akta Kastam 1967 (Akta 235), kegagalan dan/atau keengganan defendan-defendan untuk melepaskan barang tersebut kepada plaintif dan kegagalan dan/atau keengganan defendan-defendan untuk merujuk tuntutan plaintif terhadap barang tersebut kepada Mahkamah selepas tamatnya 1 bulan kalendar dari tarikh penyitaan barang tersebut hanya menjadikan penyitaan barang tersebut sebagai tidak sah.

[13] Consequent to the above, the plaintiff prayed for the following reliefs:

1. Satu deklarasi bahawa penyitaan barang tersebut oleh defendan pertama adalah menyalahi undang-undang dan dengan demikian tidak sah.
2. Gantirugi khas, gantirugi am dan gantirugi teladan ditaksir oleh Pendaftar Mahkamah yang mulia ini dan dibayar oleh defendan-defendan kepada plaintif.
3. Faedah pada kadar 5% atas jumlah gantirugi yang diperintahkan dibawah Perenggan 2 diatas dari tarikh penyitaan barang tersebut sehingga penyelesaian penuh.
4. Kos permohonan ini dibayar oleh Defendan-defendan.
5. Lain-lain relif selanjutnya yang Mahkamah Mulia ini dianggap sesuai dan adil.

[14] In opposing the plaintiff's application, the defendants, through its enforcement officer, Ranjit Singh Hardev, affirmed an affidavit, the material averments read (Rekod Rayuan Jld 1: p 50):

13. .. Defendan-Defendan tidak boleh menyerahkan barangan tersebut kerana kegagalan Plaintif hadir untuk siasatan bagi mengesahkan Plaintif adalah pemunya barangan tersebut seperti yang dikehendaki di bawah seksyen 128(1) Akta 235.
14. ...
15. ... bagi semua 40 borang K4 yang diikrarkan tidak merujuk Plaintif sebagai pemunya dan kegagalan Plaintif untuk hadir siasatan juga tidak mengesahkan Plaintif sebagai pemunya barangan tersebut di bawah seksyen 128 Akta 235.
16. ... Defendan-Defendan menyatakan bahawa kegagalan barangan diserahkan kepada Plaintif adalah berpunca semata-mata Plaintif yang gagal hadir untuk siasatan bagi mengesahkan barangan tersebut adalah kepunyaannya.
17. ... Defendan-Defendan ... menyatakan bahawa rujukan ke Mahkamah hanya akan dibuat setelah tuntutan pemunya yang sah menuntut barangan tersebut dalam masa 1 bulan dari tarikh penyitaan barangan tersebut.

A **Findings Of The High Court**

[15] Having considered the contentions of the parties, the learned Judicial Commissioner held, among others that:

(i) section 128 of the Act does not make a provision for a prosecution to
B be brought within one month;

(ii) the issue of continuous seizure does not arise because the senior officer of customs has yet to decide whether the goods are deemed to be forfeited;

(iii) that the Director General may only direct the senior officer of customs
C to refer to court when the senior officer of customs had made a decision that the goods are deemed forfeited and the senior officer refers the matter to the Director General for his directive; and

(iv) that the written claim for the goods made by the solicitor on
D 19 November 2015 on behalf of the plaintiff was not a valid claim as it was not done personally by the plaintiff.

[16] For ease of reference, the relevant findings and conclusions of the learned Judicial Commissioner are reproduced below (Rekod Rayuan Tambahan: p. 37-41):

E [38] Plaintif telah menghujahkan bahawa Defendan-Defendan berkewajipan untuk merujuk perkara penyitaan kepada mahkamah sekiranya tiada pendakwaan dibawa selepas satu bulan dari tarikh penyitaan. Mahkamah ini perlu menekankan bahawa Plaintif sebenarnya khilaf mengenai undang-undang berkaitan Seksyen 128 khasnya subseksyen 128(1) dan subseksyen 128(3). Pertamanya,
F Plaintif telah khilaf berkenaan bahawa tempoh satu bulan yang dinyatakan di dalam subseksyen 128(3), tempoh satu bulan itu bukanlah bagi maksud pendakwaan mestilah dijalankan dalam tempoh satu bulan dari tarikh penyitaan tetapi tempoh masa itu adalah bagi maksud hak tanggapan perlucutan hak. Keduanya
G berkenaan rujukan kepada Mahkamah. Subseksyen 128(3) seterusnya memperuntukkan bahawa sekiranya pegawai kanan kastam membuat keputusan bahawa barang dagangan atau hasil jualannya dianggap dilucutkan, ia hendaklah merujuk kepada Ketua Pengarahnya yang boleh mengarahkan samada barang dagangan atau hasil jualan tersebut dilepaskan dengan sekuriti di bawah
H Seksyen 115 ATAUPUN merujuk kepada Majistret Kelas Pertama.

[39] Mahkamah ini perlu juga menekankan di sini menurut subseksyen 128(3) Akta 235, Ketua Pengarah hanya boleh mengarah rujukan kepada mahkamah setelah keadaan-keadaan ini berlaku:

I *(i) tempoh penahanan dan penyitaan telah melampaui satu bulan dari tarikh penyitaan dan tiada pendakwaan dibawa, dan*

(ii) pegawai kanan kastam telah membuat keputusan bahawa barang dagangan itu dianggap dilucutkanhak, dan

(iii) pegawai kanan kastam merujuk perkara ini kepada Ketua Pengarah untuk arahannya (Penekanan oleh Mahkamah ini)

[40] Di dalam kes ini, keadaan dalam item (ii) dan item (iii) masih belum berlaku, di mana pegawai kanan kastam masih belum membuat keputusan untuk anggapan perlucutanhak barang dagangan di dalam 40 kontena tersebut, makanya prosidur lucut hak belum terlaksana untuk pegawai kanan kastam merujuk kepada Ketua Pengarahnya bagi arahan-arahan beliau.

[41] ...

[42] Berdasarkan pembacaan peruntukan sebenar subseksyen 128(3) Akta 235, Plaintif telah nyata khilaf di dalam pembacaannya. Oleh itu adalah menjadi dapatan Mahkamah ini soalan undang-undang yang diajukan oleh Plaintif adalah satu soalan yang salah tanggap dan pra-matang kerana di dalam kes ini persoalan atau isu penahanan berterusan tidak wujud kerana bagi barang dagangan di dalam 40 kontena yang disita semenjak 9.11.2015 walaupun telah melampaui tempoh satu bulan, pegawai kanan kastam masih belum membuat keputusan untuk ianya (barang dagangan tersebut) dianggap dilucutkan bagi tindakan seterusnya diambil. Justeru, di dalam keadaan kes ini tidak timbul persoalan mengenai wujudnya penahanan barangan tersebut secara berterusan adalah sesuatu bertentangan dengan undang-undang dan menjadikan penyitaan barangan itu menjadi tak sah.

[43] Memandangkan soalan-soalan undang-undang yang diajukan Plaintif adalah berdasarkan pembacaan salah akan peruntukan Seksyen 128 Akta 235 maka kedua-dua soalan tersebut tidak perlu dijawab oleh Mahkamah ini kerana Mahkamah ini telah menerangkan secara terperinci pembacaan sebenar Seksyen 128 Akta 235. Atas alasan ini sahaja, Plaintif sememangnya tidak berhak untuk deklarasi yang dipohon dan permohonannya di Kandungan 1 hendaklah ditolak.

[17] Aggrieved, the plaintiff appealed to this court. We heard the appeal and had unanimously allowed it. We now give our reasons.

The Appeal

[18] Notwithstanding the numerous grounds of appeal listed in the memorandum of appeal and the various issues raised by learned counsel for the appellant/plaintiff, to our mind, the issue for our consideration was simply this: whether upon receiving the plaintiff's written claim for the seized goods within the one calendar month period, the defendants who had refused to release the goods must refer the matter to the court who would determine the ownership by way of proceedings under sub-s. 128(4) and (5) of the Act.

[19] In essence, before us, learned counsel for the plaintiff's argument was that the learned Judicial Commissioner had fundamentally erred and misdirected herself in law in the interpretation and application of s. 128 of the Act. In support of his argument, learned counsel relied among others, on the following authorities:

(i) *Sunthararaju Pachayappan v. Jabatan Kastam Diraja Malaysia* [2010] 3 CLJ 865;

(ii) *Soong Chee Keong v. PP & Another Case* [1950] 1 LNS 84; [1951] MLJ 5; and

(iii) *Mehdi Dadashi Havadaragh v. Ketua Pengarah Jabatan Kastam Diraja Malaysia & Ors* [2015] 4 CLJ 607; [2015] 4 MLJ 646.

[20] In urging this court to affirm the decision of the learned Judicial Commissioner, learned Senior Federal Counsel (SFC) for the defendants on the other hand, cited the following cases:

(i) *The Director General of Customs Malaysia And The Director of Customs, Sarawak & Ors v. Chong Yin Kim Trading Sdn Bhd & Ors and Another Appeal* [2016] 9 CLJ 130; and

(ii) *Hock Huat Chan Sdn Bhd v. Assan Mohammad & Ors* [2008] 4 CLJ 512; [2008] MLJU 92.

Our Findings

[21] Having read the written submissions and having heard the parties orally, we decided in favour of the plaintiff as we found that the authorities are clearly in support of the plaintiff.

[22] As for the two cases cited by learned SFC, we observed that the factual background was different from the instant appeal and that they were not specifically concerned with the interpretation of s. 128 of the Act.

[23] In the case of *Director General of Customs Malaysia & Ors v. Chong Yin Kim Trading Sdn Bhd & Ors (supra)*, the Customs Department seized certain goods in the premise of the first respondent. Subsequently, the respondents filed a notice of motion for the release of the goods. The Sessions Court Judge ordered the release of the goods where she concluded that the failure of the appellants, among others, to initiate a prosecution within one month of the seizure was fatal.

[24] On appeal to the High Court, the learned judge considered the distinction between ss. 128 and 114 of the Act where it was held that s. 128 does not stipulate that the prosecution of the offence for the goods seized must be done within one month from the date of the seizure. Section 128 only deemed forfeiture of the goods seized if there was no prosecution within

one month from the date of the seizure unless the three situations as stated in s. 128(1)(a) to (c) happened. The High Court found that the release of the goods could not be said to be wrong because s. 115 of the Act allows such release. The order of release of the goods was therefore affirmed by the High Court.

[25] In *Hock Huat Chan Sdn Bhd (supra)*, the High Court had to consider the provisions under s. 114(1) and s. 132 of the Act on the two tests concerning seizures. The plaintiff who had not made a claim within one month from the date the goods were seized, challenged the defendants' seizures as without "reasonable or legal ground or reasonable or probable cause." The High Court ruled that there is no difference in the two tests but on the facts found that the seized goods were not properly forfeited and ordered for the plaintiff's claim of ownership to be adjudicated before the Magistrate's Court as provided under s. 128(4) of the Act.

[26] For the appellant, one of the cases relied upon was *Soong Chee Keong (supra)* where Taylor J, in considering s. 108 of the Customs Enactment 1937 (the predecessor to s. 128 of the Act) said at p. 6:

> Section 108 provides that when any goods are seized, notice shall forthwith be given to the owner, unless he or his agent knows about it already. If there is no prosecution, or if there is a prosecution but the Magistrate does not forfeit, and if the goods are not claimed within one month, then they are forfeited automatically by operation of law. ...
>
> ...
>
> Where a claim is made it must first be considered by the Comptroller who may release the goods but cannot forfeit them. This covers cases of seizure on suspicion where circumstances are afterwards explained to the satisfaction of the Comptroller. If he does not release, he must refer the matter to Court.

[27] The other authority was *Sunthararaju (supra)* where the plaintiff and two other persons were arrested by police officers together with nine buffaloes which were loaded on the plaintiff's motor-lorry (the seized goods). The nine buffaloes were later handed over to the defendant. The plaintiff was subsequently served with a notice of seizure and he was informed that he was suspected of committing offence(s) under s. 133(1)(e)/135(1)(e) of the Act. Upon receiving the said notice, the plaintiff submitted two statutory declarations to the defendant and made a claim for the return of the seized goods.

[28] Having received the plaintiff's claim, the defendant did not take any step to refer the matter to the court. The plaintiff filed an originating summons claiming for a declaration that the notice of seizure was null and void and *ultra vires* the provisions of the Act. Mohd Sofian Abd Razak J said at p. 875 of the report:

A [21] In the instant case the learned counsel for the plaintiff's main thrust of his case is the failure to refer the matter to the magistrate within one (1) calendar month and did not submit on the fact whether upon receipt of the notice of claimant within one (1) calendar month refer to the Director General of Customs for his decision as to whether to release the seized goods or to direct such senior officer of customs to refer the matter
B to the magistrate for his decision. Be that as it may, there is no evidence before the court that the claim by the plaintiff was referred to the Director General (controller) for him to make a decision within the one calendar month (plaintiff's view) or after the expiry of one calendar month (defendant's view) either to release the seized goods or may direct such senior officer of customs to refer the matter to the magistrate for his
C decision.

[22] With respect, the court cannot agree with the views expressed by the learned SFC on the interpretation of s. 128(3) of the Act. The learned SFC in his submission dealt only with the issue that the referring of the matter to the magistrate can be made after the expiry of the one (1)
D calendar month but did not address the point that the Director General (controller) has to make a decision first as to what to do with the plaintiff's claim. This then would be in line with decision of *Soong Chee Kong (supra)*. It was only after the plaintiff had filed this application (encl. 1) that the learned SFC had urged the court to dismiss the plaintiff's application and direct that an inquiry before the magistrate be held. In fact
E the learned counsel for plaintiff informed the court that the defendant had served a summons on the solicitors and asked the plaintiff to be present at the Magistrate's Court Kuala Nerang on 12 October 2009 to show reasonable cause why the seized goods should not be forfeited … With respect, the court with reluctance is unable to accede to the learned
F SFC's request as it would be a great injustice to the plaintiff.

[23] Based on the reasons adumbrated above, the court is of the opinion that the defendant has failed to comply with the provisions of s. 128(3) of the Act in that the Director General of Customs has to make a decision whether to release the seized goods or direct such senior officer of customs to refer the matter to the magistrate for his decision. The court
G agrees that the decision to refer the matter to the magistrate must be made within the one (1) calendar month from the date of receipt of the notice of claimant which has to be served on the defendant within one (1) calendar month from the date of receipt of the notice of seizure by the plaintiff. The upshot is that the plaintiff's application in encl. 1 is allowed with costs.

H **[29]** The decision of the High Court in *Sunthararaju (supra)* was affirmed by this court. In dismissing the defendant's appeal, this court delivered its *extempore* judgment as follows (Rayuan Sivil No: K-01-368-2009):

The facts clearly show that Appellant had not complied with section
I 128(3) which requires the Appellant to make a decision whether to release the seized goods or direct such senior officer of Customs to refer the matter to the magistrate for decision.

[30] Dissatisfied with the decision of this court, the defendant filed an application for leave to appeal to the Federal Court *vide* Permohonan Sivil No: 08(f)-179-03/2012. The affidavit in support of the application for leave stated among others that:

> 6. … Yang Arif Hakim Mahkamah Tinggi Alor Setar telah membenarkan permohonan Responden dengan memberi tafsiran undang-undang bahawa menurut peruntukan subseksyen 128(3) Akta Kastam 1967, pihak Pemohon hendaklah merujuk perkara mengenai rampasan barang-barang atau hasil jualan barang-barang rampasan tersebut kepada seorang Majistret dalam tempoh masa satu (1) bulan dari tarikh penerimaan tuntutan bertulis dari tuanpunya.
>
> 7. … dalam menolak rayuan Pemohon, Mahkamah Rayuan telah terkhilaf dalam pentafsiran undang-undang berhubung seksyen 128(3) Akta Kastam 1967 apabila mengesahkan keputusan Yang Arif Hakim Mahkamah Tinggi Alor Setar.
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> 8. ...
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> 9. ...
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> 10. ...
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> 11. … Pemohon membangkitkan persoalan undang-undang berikut untuk pertimbangan Mahkamah yang Mulia ini:
>
> (i) Sama ada atas pentafsiran sebenar subseksyen 128(3) Akta Kastam 1967, Ketua Pengarah Kastam adalah dikehendaki untuk merujuk perkara mengenai rampasan barang-barang atau hasil jualan barang-barang rampasan tersebut kepada seorang Majistret dalam tempoh satu bulan dari tarikh seorang pegawai atasan kastam menerima tuntutan bertulis menuntut hak pemunyaan atau hasil jualan barang-barang rampasan tersebut di bawah subseksyen 128(2) Akta Kastam 1967 dalam hal keadaan di mana tiada pendakwaan.
>
> (ii) Sama ada atas pentafsiran sebenar subseksyen 128(3) Akta Kastam 1967, kegagalan Ketua Pengarah Kastam untuk menjalankan tugasnya di bawah subseksyen tersebut akan membawa kesan bahawa notis penyitaan barang-barang yang dikeluarkan di bawah seksyen 114 Akta Kastam 1967 diisytiharkan tidak sah dan barang-barang rampasan dipulangkan kepada tuanpunya.

Leave was refused by the Federal Court.

[31] Reverting to the facts of the instant appeal, the defendants averred that the said goods could not be released to the plaintiff because the plaintiff failed to attend an inquiry to ascertain its ownership of the said goods.

[32] In response, the plaintiff through one Viknesvaran a/l Poogavanam stated as follows (Rekod Rayuan Jld 1: p 57):

> 11. Sebagai menjawab perenggan 13, 14, 15 dan 16 ADJ tersebut, saya menyatakan bahawa pada 8.1.2016 saya bagi pihak plaintif telah hadir bersama-sama peguamcara saya dipejabat Penolong Pengarah Kastam En. Engku Hanif bin Engku Ismail di pejabat defendan pertama di Wisma Kastam, Pelabuhan Klang untuk mengesahkan tuntutan plaintif keatas barang tersebut didalam 40 kontena tersebut. Maka pengataan defendan-defendan bahawa plaintif gagal hadir untuk siasatan adalah tidak benar dan tepat.

[33] There was no denial by Engku Hanif bin Engku Ismail as regards the plaintiff's averment quoted above and neither was there any averment by the defendants' earlier deponent that there was no such officer and therefore Engku Hanif bin Engku Ismail could not have attended to the plaintiff as averred to above. The defendants have therefore failed to rebut the plaintiff's averment on the issue of inquiry. In any event, the notice of seizure dated 27 November 2015 issued by the defendants was served on the plaintiff where the plaintiff had been specifically notified to make a written claim within one month. We therefore failed to comprehend the stand taken by the defendants as posited in their affidavit.

[34] Quite apart from the above, sub-s. 128(2) expressly provides that 'any person asserting that he is the owner of such good' has a right to claim the goods. The words 'asserting that he is the owner' in our view are wider than 'lawful owner' (pemunya yang sah). As decided by this court in *Mehdi Dadashi Havadaragh (supra)*, an unnecessarily restrictive interpretation ought not to be accorded to the words specified in s. 128(2). Further, under s. 2 of the Act, the word 'owner' includes 'any person (other than an officer of customs acting in his official capacity) being or holding himself out to be the owner, importer, exporter, consignee, agent or person in possession of, or beneficially interested in, or having any control of, or power of disposition over, the goods. There was thus no merit in the defendants' averment that the plaintiff must be "pemunya yang sah" and that "rujukan ke mahkamah hanya akan dibuat setelah tuntutan pemunya yang sah menuntut barangan tersebut dalam masa satu bulan dari tarikh penyitaan barangan tersebut.".

[35] In our judgment, the written claim made by the plaintiff's solicitor on behalf of the plaintiff was a valid claim as provided under sub-s. 128(2) of the Act, particularly when the defendants had not objected nor disputed the notice to claim from the solicitors on behalf of the plaintiff at any point in time. Further as stated earlier, it is an undisputed fact that the seizure notice issued under s. 114 of the Act was served by the first defendant on the plaintiff itself. In the circumstances, we found that the learned Judicial Commissioner erred when she ruled that the claim by the plaintiff *vide* its solicitors' letter was not a valid claim for the said goods.

[36] The defendants admitted that the said goods were seized on 9 November 2015 (see Rekod Rayuan Jld 1: p. 47 at para. 11). *Vide* a letter dated 19 November 2015, which was well within the one calendar month from the date of the seizure, the plaintiff made a claim to the said goods. Even if one were to take the notice of seizure dated 27 November 2015, the plaintiff had again made its written claim *vide* a letter dated 30 November 2015, also within the prescribed time.

[37] In the light of the authorities quoted earlier, we ruled that pursuant to sub-s. 128(3) of the Act, where a written claim is made by the plaintiff for the said goods within one calendar month from the date of seizure and where no prosecution is commenced in respect of the said goods within the same period of time, then on the expiration of the one calendar month from the date of notice of claim, the defendants shall release the goods or refer the claim to the Magistrate's Court. Since the defendants had failed to do either, we found that the defendants have failed to observe the statutory requirements under s. 128 of the Act.

[38] The learned Judicial Commissioner, with respect erred in her finding that the plaintiff's application was premature and misconceived as the senior officer of customs has yet to decide on forfeiture of the goods and that the Director General may only direct the senior officer of customs to refer the matter to court when the senior officer of customs had made a decision that the goods are deemed forfeited and the senior officer refers the matter to the Director General for his directive.

[39] We opined that there need not be a decision by the senior officer of customs that the goods are deemed forfeited as the forfeiture occurred by operation of law, namely when the three situations stated in sub-s. 128(1)(a) to (c) did not occur before the expiration of one month from the date the said goods were seized. It is expressly provided under sub-s. 128(1) of the Act that the goods shall not be taken or deemed to be forfeited if there was a written claim made by any person asserting that he is the owner within one calendar month from the date of seizure. And if the goods were deemed forfeited, then the issue of referring the matter to court did not arise.

[40] At this juncture, it is perhaps useful to quote the observation made by David Wong Dak Wah J (as he then was) in *Hock Huat Chan (supra)*, the case relied upon by the defendants:

> To recap, the Customs Act provides that when goods are seized and there is no prosecution, the owner of the goods must make a written claim for the ownership within one calendar month from the date of the seizure. Failure to do so will result in the seized goods being forfeited. If a written claim is made, it is referred to a magistrate who will conduct a hearing to decide whether the seized goods are the subject matter of any customs offence.

A Although the decision of the High Court in *Hock Huat Chan (supra)*, was reversed by this court where this court held that there was no contravention of the Act in respect of the forfeiture of the goods (see *Assan Mohammad & Ors v. Hock Huat Chan Sdn Bhd* [2013] 9 CLJ 545; [2013] 5 MLJ 76), the above observation remained and was not disturbed.

B **[41]** Premised on the foregoing, the appeal was allowed with costs and the case remitted to the High Court for assessment of damages under prayer 2 of the plaintiff's application.

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